THE STATE OF SOUTH CAROLINA
In the Supreme Court of the State of South Carolina

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Panel Order

WCC File No. 1222136

Otis Nero, Claimant, ... Respondent,

vs.

South Carolina Department of Transportation, Employer,
and State Accident Fund, Carrier, ... Petitioners.

RESPONDENT'S RETURN TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

This is a Workers' Compensation matter. The Respondent filed a claim alleging that, while working on a South Carolina Department of Transportation crew using a squeegee board to level cement, he suffered a sudden onset of pain in his neck and shoulders followed thereafter by an episode of syncope.

The Defendants denied the accident and notice. The case was tried before the Single Commissioner on March 28, 2014. As presented during the hearing, the following facts are undisputed:

Undisputed Facts:

On June 20, 2012, the Claimant was working on a South Carolina Department of Transportation road crew of ten to twelve people supervised by lead man Benjamin Durant and supervisor Danny Bostick. (App. p. 173, lines 17-20; App. p. 211, lines 10-12).

Claimant, along with four to five other members of the crew, worked that day pulling a "squeegee board", that is, a 30 foot 2x4, to level freshly poured concrete on a 30 foot by 30 foot concrete pad. (App. p. 173, lines 20-24; App. p. 211, lines 11-12; App. p. 298, line 20 - p. 301, line 24).

The pad was located in the center of a field; there was no shade, it was summertime, and it was very hot. (App. p. 324, lines 10-12; App. p. 174, lines 1, 7).

During the work, Mr. Bostick became concerned that the Claimant appeared overheated, and he temporarily pulled the Claimant off of the squeegee board. (App. p. 173, line 24 - p. 174, line 10). Specifically, Bostick testified:

Q. ... So on June 20, 2012, did you see him do any of what you

describe as straining work?

A. Well, I have — I have stopped him because he was the oldest guy mostly in the crew, and I have younger guys, and I will tell him, give up that squeegee board. Let one of them younger guys get a hold of that board and do it.

Q. Okay.

A. And he will come off of it.

Q. So —

A. Because it's hot.

Q. Well, my question is very specific. On June 20, 2012, the alleged date of injury, did you do any of what you just described?

A. Yes.

Q. Okay. You told him to get off the squeegee board?

A. Yes.

Q. Okay. Now, why did you do that?

A. It's hot, and I know he's an older guy, so if I know I can — we've got other people that can relieve him, I try to take him off of that.

Q. Okay. Did he make any complaints to you about not being able to perform his — his job?

A. No.

Q. Okay. Is it fair to say you did that out of an abundance of caution?

A. Yeah. That's — I try to protect the people, too, at work. As far as doing our job, I also take it personal to try to get them home safely.

Q. Okay. Now, what job did you put him on after you took him off the squeegee board?

A. Basically he just took a break. He got up, wiped the sweat mostly. It was hot. Like I said, it was real hot out there. We was in the center of a field, no trees, no nothing. He's hot. So when I can — if I see a guy on the field like he's looking weary or like he's trying to get overheated, I try to give them a break.

Q. So did he look weary and overheated?

A. Well, he looked hot to me, you know. Like I said, it was a hot day. It was a hot day, I know. I can remember that much of it. It was real hot, and, like I said, I always try to look out, especially for the — if they're older guys, ladies, whatever.

(Bostick p. 33, line 2 - p. 34, line 21).

Claimant testified that he felt an onset of pain in his neck prior to being taken off the

squeegee board. (App. p. 183, lines 11-17). This fact was contested by the Employer; however, it is undisputed that the Claimant did not tell his Employer at that point, or at any time during the notice period, that he suffered pain in his neck while pulling the board. (App. p. 174, lines 10-13; App. p. 183, lines 18-20; A. p. 229, lines 6-8).

After being given a break by Bostick, Claimant returned to work pulling the squeegee board. (App. p. 211, lines 14-15).

At approximately 3:00 in the afternoon, after finishing their work and cleaning up, though while still on the clock, the crew, including the Claimant, Durant, and Bostick, were standing around the supervisor's truck talking and joking when the Claimant passed out and fell to the ground unconscious; witnessed by Durant and Bostick. (App. p. 174, lines 15-22; App. p. 211, lines 15-19; App. 229, lines 9-10).

The Claimant regained consciousness, got up, told his supervisors he was fine, and drove himself home; where he passed out a second time in his driveway. (App. p. 211, lines 19-21).

His wife immediately took him to the hospital where he was admitted and treated by hospitalist Dr. Robert Richey and neurosurgeon Dr. William Naso. (App. p. 438-455).

Claimant spoke with his supervisors while in the hospital and they were aware he was in the hospital and ultimately aware that he underwent cervical spine surgery at the hands of Dr. Naso. (App. p. 227, lines 16-20).

Plaintiff never returned to work thereafter. (App. p. 333, lines 11-12).

The Single Commissioner found accident and causation, found notice was adequate, that reasonable excuse was given for lack of more formal notice, and that the Employer failed to demonstrate prejudice as the result of the absence of more formal notice. The Workers'

Compensation Appellate Panel reversed on the issue of notice, and the Claimant appealed.

The Court of Appeals found:

> Although Nero never formally reported his injuries to his supervisors, Durant and Bostick both witnessed Nero fall to the ground, unconscious, after completing the physically challenging squeegee board work. *See Hanks,* 286 S.C. at 381, 335 S.E.2d at 93 ("Section 42-15-20 provides no specific method of giving notice, the object being that the employer be actually put on notice of the injury so he can investigate it immediately after its occurrence and can furnish medical care for the employee in order to minimize the disability and his own liability.") Significantly, Durant's reason for not reporting Nero's incident to Bostick was that Bostick was "right there." We find the substantial evidence in the record does not support the Appellate Panel's finding that Nero failed to put SCDOT on notice of a potential injury. *See Etheredge,* 349 S.C. at 459, 562 S.E.2d at 683 (concluding "notice is adequate, when there is some knowledge of accompanying facts connecting the injury or illness with the employment, and signifying to a reasonably conscientious supervisor that the case might involve a potential compensation claim"). Because our supreme court has long held that this notice provision is to be liberally construed in favor of claimants, we find the Appellate Panel erred in reversing the single commissioner's determination that SCDOT received adequate notice under section 42-15-20(A).
> (App. pp. 7-8).
>
> * * *
>
> Although Nero failed to give SCDOT formal notice, his excuse was reasonable because his supervisors were both present at the time of his injury and were aware of his treatment. In fact, Durant's reason for not reporting Nero's incident to Bostick was that Bostick was "right there" during the incident. Therefore, the substantial evidence in the record does not support the Appellate Panel's finding that Nero failed to provide a "reasonable excuse" for failing to provide timely notice pursuant to section 42-15-20(B). Further, because SCDOT was aware Nero never returned to work following the June 2012 syncopal episode and knew of his hospitalization and surgical treatment, no prejudice can be established.
> (App. p. 10).

On Petition for Rehearing, the Court of Appeals withdrew that opinion and substituted for

it a refiled opinion of August 23, 2017, which maintained the same holdings but added to the discussion of the Standard of Review the following language:

> "Statutory interpretation is a question of law subject to de novo review." *Transp. Ins. Co. & Flagstar Corp.*, 389 S.C. at 428, 699 S.E.2d at 689. "The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." *Id.* (quoting *Dunton v. S.C. Bd. of Exam'rs In Optometry*, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987)(citations omitted)). However, workers' compensation statutes are to be liberally construed in favor of coverage to serve the beneficent purpose of the Workers' Compensation Act; "only exceptions and restrictions on coverage are to be strictly construed." *James v. Anne's Inc.*, 390 S.C. 188, 198, 701 S.E.2d 730, 735 (2010). Because the issue of timely notice is a jurisdictional question, "the [c]ourt may take its own view of the preponderance of the evidence." *Shatto v. McLeod Reg'l Med. Ctr.*, 406 S.C. 470, 475, 732 S.E.2d 416, 419 (2013)(quoting *Wilkerson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009)); *Mintz v. Fiske-Carter Constr. Co.*, 218 S.C. 409, 413, 63 S.E.2d 50, 52 (1951)(reversing award of compensation and noting hearing commissioner awarded compensation without discussion of "the jurisdictional defense of timely notice").
> (App. pp. 13-14).

Similarly, the Court of Appeals amended their holdings to reflect the application of de novo review of the issue of notice, reasonable excuse and prejudice. (App. pp. 18, 20).

Petitioners' Petition for Certiorari followed.

ARGUMENT

I. THE COURT OF APPEALS DID NOT EXCEED THEIR AUTHORITY AS AN APPELLATE COURT WHEN THEY APPLIED THE LAW TO THE UNDISPUTED FACTS PRESENTED IN THIS CASE.

Where the relevant facts are undisputed, the appellate court may rule as a matter of law. See, Gibson v. Spartanburg Sch. Dist. #3, 338 S.C. 510, 518 (Ct. App. 2000)(finding "where, as here, the

facts are undisputed, the question of whether an accident is compensable is a question of law"). See also, Jordan v. Dixie Chevrolet, Inc., 218 S.C. 73 (1950)(finding "upon admitted or established facts the question of whether an accident is compensable is a question of law and this is not an invasion of the fact finding field of the commission on the part of the court.").

This case involved the application of the following undisputed facts:

On June 20, 2012, the Claimant was working on a road crew supervised by lead man Benjamin Durant and supervisor Danny Bostick. (App. p. 173, lines 17-20; App. p. 211, lines 10-12).

Claimant, along with other members of the crew, worked that day pulling a "squeegee board", to level freshly poured concrete. (App. p. 173, lines 20-24; App. p. 211, lines 11-12; App. p. 298, line 20 - p. 301, line 24).

The pad was located in the center of a field; there was no shade; it was summertime; and it was very hot. (App. p. 324, lines 10-12; App. p. 174, lines 1, 7).

During the work, Mr. Bostick became concerned that the Claimant appeared overheated, and he temporarily pulled the Claimant off of the squeegee board. (App. p. 173, line 24 - p. 174, line 10).

Claimant testified that he felt an onset of pain in his neck prior to being taken off the squeegee board. (App. p. 183, lines 11-17). This fact was contested by the Employer; however, it is undisputed that the Claimant did not tell his Employer at that point, or at any time during the notice period, that he suffered pain in his neck while pulling the board. (App. p. 174, lines 10-13; App. p. 174, lines 18-20; App. p. 229, lines 6-8).

After being given a break by Bostick, Claimant returned to work pulling the squeegee board. (App. p. 211, lines 14-15).

After finishing their work and cleaning up, though while still on the clock, the crew, including the Claimant, Durant, and Bostick, were standing around the supervisor's truck when the Claimant passed out and fell to the ground unconscious; witnessed by Durant and Bostick. (App. p. 174, lines 15-22; App. p. 211, lines 15-19; App p. 229, lines 9-10).

The Claimant regained consciousness, got up, told his co-workers, lead man, and supervisor he was fine, and drove himself home; where he passed out a second time in his driveway. (App. p. 211, lines 19-21).

His wife immediately took him to the hospital where he was admitted and treated by hospitalist Dr. Robert Richey and neurosurgeon Dr. William Naso. (App. pp. 438-455).

Claimant spoke with his supervisors while in the hospital and they were aware he was in the hospital and ultimately aware that he underwent cervical spine surgery at the hands of Dr. Naso. (App. p. 227, lines 16-20).

Plaintiff never returned to work thereafter. (App. p. 333, lines 11-12).

The Claimant's lead man, Mr. Durant, testified that he did not report Mr. Nero's incident to his supervisor, Mr. Bostick, because Mr. Bostick was "right there". (App. pp. 128 - 132).

Thus, the facts pertinent to the issue of notice are undisputed. The question of whether notice was adequately given, or properly excused, is a question of law. Its determination by the Court of Appeals, de novo, was not an invasion of the fact finding field of the Commission by the Court.

The Petitioners conflate factual findings with legal conclusions; arguing that the Court of Appeals found its own facts. (Pet. for Writ of Cert. p.10). The Petitioners, however, never identify what facts, relevant to notice, were in dispute.

In their first Petition for Rehearing to the Court of Appeals, the Petitioners argued "the facts

of the claim were unquestionably in dispute with regard to (1)[1] whether there were sufficient accompanying facts connecting the injury or illness with the employment to signify to a reasonably conscientious supervisor that the case might involve a potential claim." (App. p. 24). There, as here, the Petitioners do not identify any genuine issue of material fact. Instead, they seek to recast the legal standard for notice, set by the Court in Etheredge v. Monsanto, as a factual issue.

For adequate notice, as a matter of law, the facts must demonstrate that the employer had, " 'some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim.' " Etheredge v. Monsanto Co., 349 S.C. 451, 457 (Ct. App. 2002)(quoting Larson's Workers' Compensation Law, §126.03[1][6](2001)(footnotes omitted)).

It is certainly the case that the legal issue as to whether the undisputed facts meet the legal standard of notice was directly contested in this appeal. What is critical to the applicable standard of review, however, is that the legal conclusion was in dispute, not the underlying facts upon which a conclusion was based.

The Court did not misapply the standard of review or invade the province of the Commission. The Court simply applied the law to undisputed facts.

In any event, the Court of Appeals also properly found that, because the issue of notice is a

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[1]Petitioners also cited, as facts in dispute, "(2) whether [Claimant] sustained his burden in proving that his injuries and resulting treatment were the result of a compensable work accident..." (App. p. 24).

Whether of not there was an issue of fact as to medical causation is irrelevant to the question of the proper standard of review on the issue of notice.

The Single Commissioner found medical causation based, to a large extent, on the testimony of the Claimant's treating physician Dr. Robert Richey. (App. pp. 124-127). The Appellate Panel reversed the Single Commissioner's award on the issue of notice alone. (App. pp. 159-160). The parties briefed and argued this case to the Court of Appeals on the issue of notice. (App. pp. 52, 81). It is well established that a party cannot raise a new argument, such as medical causation, on a Petition for Rehearing, or Petition for Certiorari as the Employer seeks to do here. See Kennedy v. S.C. Pet. Sys, 349 S.C. 531 (2001).

jurisdictional issue, the Court had the authority, and the obligation, to take its own view of the preponderance of the evidence. (App. p. 14. (citing Shatto v. McLeod Regional Medical Center, 406 S.C. 470, 475 (2013); Mintz v. Fiske-Cooler Constr. Co., 218 S.C. 409, 413 (1951)).

In sum, because notice is a jurisdictional issue, the Court of Appeals had the authority to find facts based on its own view of the preponderance of the evidence. However, the material facts as to the issue of notice were not in dispute and all that remained was a question of law. Based upon those undisputed facts the Court properly found both adequate notice and reasonable excuse.

II. THE COURT OF APPEALS CORRECTLY FOUND ADEQUATE NOTICE AND REASONABLE EXCUSE WITHOUT UNDUE PREJUDICE.

A. ADEQUATE NOTICE.

South Carolina Code §42-15-20 requires that:

> (A) Every injured employee or his representative immediately shall on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a notice of the accident and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this title prior to the giving of such notice, unless it can be shown that the employer, his agent, or representative, had knowledge of the accident or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity or the fraud or deceit of some third person.
>
> (B) Except as provided in subsection (C), no compensation shall be payable unless such notice is given within ninety days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the commission for not giving timely notice, and the commission is satisfied that the employer has not been prejudiced thereby.
>
> S.C. Code Ann. §42-15-20 (Supp. 2014).

It is well-established, and the parties agree, that:

> For adequate notice, there must be 'some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim.'
> Etheredge v. Monsanto Co., 349 S.C. 451, 457 (Ct. App. 2002)(quoting Larson's Workers' Compensation Law, §126.03[1][6](2001)(footnotes omitted)).

In Etheredge v. Monsanto Co., the Court of Appeals explained:

> 'The object [of providing timely notice under §42-15-20] being that an employer be actually put on notice of the injury so he can investigate it immediately after its occurrence and can furnish medical care for the employee in order to minimize the disability and his own liability.' [citing Hanks v. Blair Mills, Inc., 286 S.C. 378 (Ct. App. 1995), which, in turn, cited Teigue v. Appleton Co., 221 S.C. 52 (1952)].
>
> The provisions of §42-15-20 regarding notice should be liberally construed in favor of claimants. Mintz v. Fiske-Carter Constr. Co., 218 S.C. 409 (1951). In Mintz our Supreme Court held:
>
> It is concluded there, upon many authorities, that the provision for notice should be liberally construed in favor of claimants, but there are limitations upon that rule and the statutory requirement cannot be disregarding altogether. Its purpose is at least twofold; first, it affords protection of the employer in order that he may investigate the facts and question witnesses while their memories are unfaded, and second, it affords the employer opportunity to furnish medical care of the employee in order to minimize the disability and consequent liability upon the employer.
> Etheredge at 458.

The Etheredge Court held:

> We conclude that notice is adequate when there is some knowledge of accompanying facts connecting the injury or illness with the employment, and signifying to a reasonably conscientious supervisor that the case might involve a potential compensation claim.
> Id. at 459.

Thus, to establish adequate notice under South Carolina Code §42-15-20, it is not necessary

that the employee prove his claim, or even state his claim with specificity. Instead, the employer need only have "some knowledge of accompanying facts connecting the injury or illness with the employment" sufficient to alert the employer that the "case might involve a potential compensation claim" so that the employer may investigate the case while memories are unfaded and furnish medical care in order to minimize the claimant's disability.

The Employer argued, and the Commission Panel cited, Sanders v. Richardson, 251 S.C. 325 (1968), in support of their conclusion that the claimant failed to provide adequate notice. In Sanders this Court found that the fact that the claimant told the employer, "I feel like I'm kind of hurting ... I've got a kind of hurting in my side and in my back ... I got a knot on my side ..." was insufficient to provide notice of an injury suffered while lifting a heavy bag of mortar. Sanders, at 327-328.

The Sanders Court found that the claimant's comments "would make the employer aware of the fact that the [claimant] was having some physical difficulty while at work but the employer's knowledge of the fact that an employee becomes ill while at work does not necessarily, of itself, serve the employer with notice that such illness constituted or resulted in a compensable injury." Id.

Here, however, the Employer had far more knowledge than the employer in Sanders. While it is undisputed that the Claimant did not tell the Employer, within ninety (90) days of the incident, that he suffered pain in his neck while pulling a squeegee board, it is also undisputed that the Employer was aware that the Claimant had been working all day in the heat pulling the squeegee board, that the supervisor had pulled him from that work during the day due to fatigue, that at the conclusion of the day the Claimant lost consciousness and fell to the ground in the presence of his supervisors, that the Claimant was, that day, admitted to the hospital where he was treated by a neurosurgeon who diagnosed cervical stenosis and, shortly thereafter, performed neck surgery, and

that the Claimant had not returned to work thereafter.

The Employer argues that based on those facts the Employer could not know that the Claimant's neck condition had been aggravated by the pulling of the squeegee board, causing him to pass out. Certainly, given the Employer's knowledge at that time, it was equally likely from the Employer's perspective that the Claimant passed out from heat prostration, or that the Claimant's passing out and falling to the ground itself caused him a neck injury.

However, it is not necessary that the Claimant prove his claim to provide adequate notice. It is not even necessary that the Claimant even make his claim to provide notice. Instead, what Etheredge requires is:

> ... some knowledge of accompanying facts connecting the injury or illness with the employment, and signifying to a reasonably conscientious supervisor that the case might involve a potential compensation claim.
> Etheredge, at 459.(emphasis added).

While the Employer may not have been aware of the precise mechanism of the Claimant's injury, they had sufficient knowledge to alert them that the Claimant's condition might potentially be connected to work, given the day's events.

Ultimately, after investigation, the testimony of Dr. Richey revealed that pulling the squeegee board in the heat aggravated the Claimant's pre-existing, though previously asymptomatic, neck condition and that aggravation, along with getting overheated, caused him to pass out.

What is important for notice, though, is not the precise mechanism of injury that the investigation ultimately uncovers, but, rather, that the employer has sufficient knowledge of a potential work connection to trigger an investigation in the first place.

The Employer's undisputed knowledge was, as a matter of law, sufficient to trigger a

reasonably conscientious supervisor to investigate what had occurred on the job that day, its cause, and its consequence.

In sum, it is undisputed that the Claimant did not notify the Employer that he had pain in his neck while pulling the squeegee board within ninety (90) days. However, the Employer was aware that he passed out and fell to the ground after pulling the squeegee board during the heat of the day, that he was hospitalized later that day, and required neck surgery shortly thereafter.

On that knowledge it was, admittedly, equally possible Claimant had suffered from heat prostration causing him to fall, or that the fall caused him to have a neck injury, or that he had hurt his neck while pulling the squeegee board causing him to pass out, or some combination thereof. That knowledge was sufficient to make the Employer aware that the case might involve a potential compensation claim; alerting them to the need for investigation.

Pursuant to Etheredge, that was adequate notice as a matter of law.

B. REASONABLE EXCUSE.

The Single Commissioner found:

> 6. I find that pursuant to S.C. Code §42-15-20 the Claimant had a reasonable excuse for not formally reporting his work injury due to the fact that his lead man, Mr. Durant, and the crew supervisor, Mr. Bostick, were both present and had knowledge of the pertinent facts surrounding the accident sufficient to indicate the possibility of a compensable injury and followed up with the Claimant after the accident; moreover, the Department of Transportation was aware that the Claimant had not returned since his syncopal episode on June 20, 2012 and they were further aware that he had been hospitalized and had ultimately been treated by a neurosurgeon and undergone neck surgery.
>
> * * *
>
> The Claimant demonstrated reasonable excuse for not

formally reporting the work injury because his supervisors were present and, as the Claimant testified, he had spoken with them both while in the hospital.

(App. pp. 128-129).

The Single Commissioner went on to find:

> The Claimant's lead man, Mr. Durant, was also present during the incident of syncope and he testified that he was required to report all accidents, (Dep. Durant p. 42, line 1 – p. 43, line 8), but that he did not report the Claimant's syncope to his supervisor because his supervisor was present. He testified:
>
> Q. I'm looking at this instructions you guys got about injuries on the job. As the lead man, do you get to choose -- you have some discretion in choosing what injuries to report and what injuries not to report?
>
> A. Do we get -- no. I don't care if it's -- if it -- whatever it is, it is, if it's small or whatever else.
>
> Q. I mean, a guy hurts his thumb, you've got to report it?
>
> A. If you hurt your thumb and you feel like you need medical attention, you need to go report it.
>
> * * *
>
> Q. But do you have any responsibility as the lead man to report injuries?
>
> A. Do I have any? Yes, if it happens right here with me, I have a responsibility to report it.
>
> Q. What if I say, look here, lead man, it's just my thumb. Don't worry about it. I don't want to report it.
>
> A. Well --
>
> Q. Can you say, no, we're not going to tell the supervisor?
>
> A. No. I'm not going to do that because there's too much that come back and bite you.
>
> Q. **All right. Well, let me ask you, when he**

passed out that day, did you tell your supervisor about it?

A. **He was right there.**

(Dep. Durant, p. 44, line 18 – p. 47, line 12) (emphasis added).

Q. Safe to say, after that day, when you knew that Nero had passed out, you felt like that it had been reported wherever it needed to be reported on the count of the fact that your supervisor was standing right there?

A. Well, not only that, I mean, being real, it probably done got back to whoever it need to get back to when he was out of work.

(Dep. Durant p. 49, l. 14-21).

Thus, the lead man, Mr. Durant, like the Claimant, believed the incident had been adequately reported because of the presence of their respective supervisor.

(App. pp. 128-132)(emphasis added).

Essentially the Claimant's excuse for not filling out a formal report of the incident was that his supervisor was present when it occurred, he had talked to him while in the hospital, and the supervisor was aware of his treatment. In fact, this is precisely the same excuse that his lead man, Mr. Durant, gave for not reporting the incident to his supervisor, Mr. Bostick. "He was right there." (App. pp. 128 - 132 (quoting Dep. Durant p. 47, line 12)).

In reversing the Single Commissioner's finding of reasonable excuse, the Commission's Appellate Panel found:

> 15. We find that pursuant to S.C. Code Ann. §42-15-20, Claimant failed to provide a reasonable excuse made to the satisfaction of the Commission for failure to provide timely notice as required by the statute. Although Claimant's supervisors witnessed Claimant's syncope episode, Claimant never reported the alleged accident pulling the squeegee board, which was the basis of his claim. Claimant was given

> several opportunities to report his work accident and even submitted FMLA paperwork to the Human Resources Department indicating that his problems lasted for several years instead of requesting workers' compensation.

(App. p. 157).

In essence, in evaluating reasonable excuse, the Commission's Appellate Panel just reiterated their finding that notice was inadequate because "Although Claimant's supervisors witnessed Claimant's syncope episode, Claimant never reported the alleged accident pulling the squeegee board, which was the basis of his claim." (App. p. 157).

The Court of Appeals reversed, finding that the Appellate Panel misapprehended what the law requires of adequate notice. That is, it was only necessary for the Employer to have knowledge of the accompanying facts connecting the accident with the employment to indicate that the case might involve a potential workers' compensation claim. The Court of Appeals held that the Employer's knowledge that the Claimant passed out and fell to the ground after working in the heat all day, was hospitalized, and underwent neck surgery, was sufficient to prompt a reasonable employer to investigate whether there might be a potential workers' compensation claim. (App. p. 122).

However, what was at issue in the Commission Panel's Finding No. 15 was not the adequacy of notice, but whether the Claimant had a reasonable excuse for not providing more formal notice.

Even assuming that the notice was inadequate, the Court of Appeals correctly found the Claimant reasonably believed that the notice was adequate because his lead man and supervisor were present and aware of his treatment; the same excuse his lead man gave for not filing a report himself. (App. p. 20).

The Commission Panel made no explanation in its Order as to why that excuse was not reasonable.

The Court of Appeals correctly found that the Claimant reasonably believed, as did his lead man, that the Employer's presence at the syncopal episode and their knowledge of his treatment gave the Employer adequate notice to trigger their investigation of the case.

C. ABSENCE OF PREJUDICE

The Single Commissioner found:

> **7. I find that the Defendants were not prejudiced by the late formal reporting of the injury.**
>
> Once reasonable excuse has been established, it is the employer's burden to demonstrate prejudice from the absence of formal notice. (See Lizee v. S.C. Department of Mental Health, 367 S.C. 122 (S.C. App. 2005)). Again, in evaluating prejudice, the Commission is cognizant that the purpose of the notice requirement is to afford the employer the ability to investigate the facts of a claim while the witnesses memories are unfaded; and secondly, to afford the employer the opportunity to furnish medical care to minimize disability. (See, e.g., Mintz vs. Fiske-Carter Construction Company, 218 S.C. 409 (1951)).
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> Here, the Claimant's supervisors witnessed the syncopal episode and were able to testify with clarity as to their recollections. The Claimant received treatment at the hospital the day of the accident and remained in the hospital to see a neurosurgeon, who diagnosed the Claimant with cervical radiculopathy after reviewing an MRI of his cervical spine performed within four days of the accident. After conservative care, the neurosurgeon ultimately performed surgery on August 28, 2012, approximately two months after the accident.
>
> The evidence of the record reveals that the employer was aware that the Claimant was in the hospital and that he was being

treated by a neurosurgeon for cervical radiculopathy. (See Plaintiff's Exhibits 1 – 5). In fact, the employer wrote the neurosurgeon for his views as to the Claimant's work ability in November, 2012. (Plaintiff's Exhibit 5).

The only suggestion of prejudice that the employer makes is that they were not able to send Claimant to a physician of their choice to explore a treatment alternative to surgery. (Hrg. Tr. p. 11, line 24 – p. 12, line 4).

However, it is undisputed that the employer was aware, as early as July 9, 2012, just three weeks after the accident, that the Claimant's family doctor, Dr. Richey, believed that the Claimant required neck surgery. (Plaintiff's Exhibit 1). Similarly, by July 12, 2012, by virtue of Claimant's Exhibit 2, the employer was aware that the Claimant was being treated for cervical radiculopathy by Florence Neurosurgery & Spine.

The records of Dr. Naso at Florence Neurosurgery & Spine reveal that he recommended, and Claimant underwent, conservative treatment including a series of epidural steroid injections and physical therapy before Dr. Naso recommended and performed surgery. (Claimant's APA No. 2). At no point, did the employer indicate any dissatisfaction with the treatment the Claimant was receiving. Indeed, the employer wrote Dr. Naso in November, 2012 to obtain his opinions as to the Claimant's work ability. (Plaintiff's Exhibit 5).

The Defendants have offered no evidence to support a conclusion that they were prejudiced in any way by the absence of more formal notice of the Claimant's injuries. Indeed it would seem that the Claimant's medical treatment was prompt and comprehensive. Moreover, the employer's investigation of the accident was unimpaired, given the fact that two of Claimant's supervisors actually witnessed the pertinent facts, and recalled them with clarity.

The employer has suffered no prejudice.

(App. pp. 133-135).

The Commission Appellate Panel reversed finding:

> 16. We find that pursuant to S.C. Code Ann. §42-15-20, Defendants suffered a prejudice as a result of Claimant's failure to provide timely notice. Defendants were unable to fully investigate whether Claimant's alleged squeegee accident caused syncope episode, or whether the alleged squeegee accident or the syncope fall caused the aggravation of his cervical condition. As a result of the prejudice against the Defendants caused by Claimant's failure to provide timely notice, Claimant's request for benefits is denied. (App. p. 157).

South Carolina Code §1-23-350 requires that findings of fact "be accompanied by a concise and explicit statement of the underlying facts supporting the findings." Our courts have consistently held that findings of fact must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence in the record and whether the law has been properly applied. See, Kiawah Prop. Owners Group v. PSC, 338 S.C. 92 (1999).

The Commission Appellate Panel's finding states no facts supporting its conclusion that the Employer's investigation of the events was impaired.

The Commission's finding fails to address the fact that the Claimant's supervisors were present when he passed out, that they were aware of his treatment, and by whom it was being provided. The Commission Panel's finding does not consider the fact that the Claimant's supervisors testified in deposition with clarity as to their recollection of the facts.

The Employer offered no evidence in the record, and the Commission's Appellate Panel finding cites no evidence, indicating what further investigation the Employer was unable to do because of the absence of more formal notice.

The object of providing timely notice under §42-15-20 is to put the employer on notice of a potential claim so they can investigate it and furnish medical care for the employee in order to minimize the disability and their own liability. See Etheredge, at 381.

The Employer offers, and the Commission cited, no evidence establishing what further investigation it would have done, or what further medical treatment it would have provided, had it received timely formal notice.

Given these facts, the Court of Appeals properly held "because SCDOT was aware Nero never returned to work following the June, 2012 syncopal episode and knew of his hospitalization and surgical treatment, no prejudice can be established." (App. p. 20).

CONCLUSION

This case does not involve a novel question of law, a dissent, a conflict in Appellate Court decisions, or any other basis sufficient to justify review by this Court. Instead, it involves only the Court of Appeals' application of the well-settled law of notice to undisputed facts.

The established facts are that the Claimant never formally reported his injury to his supervisor, or lead man, although they both witnessed his fall to the ground on the job after a day of physically challenging work, they were aware that he never returned to work following the incident, and they knew of his immediate hospitalization and subsequent surgery. Moreover, the Claimant's excuse for not formally reporting his injury to his lead man was the same excuse his lead man offered for not reporting the incident to his own supervisor: He was "right there".

Based on these undisputed facts, the Court of Appeals properly applied the well-settled law of Etheridge v. Monsanto Co. to find that notice was adequate because there was "some knowledge of accompanying facts connecting the injury or illness with the employment and indicating to a

reasonably conscientious manager that the case might involve a potential workers' compensation claim". Moreover, the Court of Appeals properly held that, given the lead man and supervisor's knowledge and the Claimant's prompt medical treatment, the Claimant's excuse was reasonable and no prejudice was suffered by the Employer due to the lack of more formal notice.

The Court of Appeals applied settled law to undisputed facts. The Petition for Certiorari should be dismissed.

Respectfully submitted,

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Dated: 10/12/17

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THE STATE OF SOUTH CAROLINA
In the Supreme Court of the State of South Carolina

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Panel Order

WCC File No. 1222136

Otis Nero, Claimant, ... Respondent,

vs.

South Carolina Department of Transportation, Employer,
and State Accident Fund, Carrier, ... Petitioners.

PROOF OF SERVICE

I certify that I have served the Petitioners with the Respondent's Return to Petitioners' Petition for Writ of Certiorari by depositing a copy of it in the United States Mail, postage prepaid, on October 12, 2017, addressed to the Appellants' attorney of record, J. Gabriel Coggiola, at his office at Willson, Jones, Carter & Baxley, PA, 3600 Forest Drive, Suite 204, Columbia, SC 29204.

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